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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

**FRANK ANTHONY SANCHEZ,**

Petitioner,

**v.**

**DIRECTOR OF CORRECTIONS AND JERRY  
BROWN, ATTORNEY GENERAL OF  
CALIFORNIA,**

Respondent.

C 07-6292 PJH (PR)

**MOTION TO DISMISS  
HABEAS PETITION AS  
BARRED BY THE STATUTE  
OF LIMITATIONS**

Respondent<sup>1/</sup> hereby moves to dismiss the petition for writ of habeas corpus on the ground that it is untimely under 28 U.S.C. § 2244(d), the statute of limitations established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Respondent has not noticed this motion for hearing as petitioner is in custody and is not represented by counsel.

1. Respondent notes that the proper respondent in a habeas corpus proceeding is the petitioner's custodian, "not the Attorney General or some other remote supervisory official." *Rumsfeld v. Padilla*, 542 U.S.426, 435 (2004); *see* Rule 2(b) of the Rules Governing Section 2254 Cases in the United States District Courts. Accordingly, respondent moves to remove Jerry Brown, Attorney General of California, as a respondent in the present case.

1 By order of January 25, 2008, this Court gave respondent the option of filing a motion to  
2 dismiss on procedural grounds in lieu of an answer. Or. at 3. A motion to dismiss is proper where  
3 the petition is procedurally defective. *See White v. Lewis*, 874 F.2d 599, 602 (9th Cir. 1989);  
4 *O'Bremski v. Maass*, 915 F.2d 418, 420 (9th Cir. 1990); Rules Governing 28 U.S.C. § 2254 Cases,  
5 Rule 4 and Advisory Committee Notes.

### 6 PROCEDURAL BACKGROUND

7 After petitioner pled no contest to ten felonies and one misdemeanor and admitted having  
8 one prior strike and one prior serious felony conviction, the trial court sentenced him to sixteen years  
9 and four months in compliance with the terms of petitioner's negotiated plea. Ex. 1 at 2.

10 On October 20, 2004, the California Court of Appeals, in an unpublished opinion, reversed  
11 the judgment and remanded the case to the trial court for the limited purpose of allowing petitioner  
12 to file his motion to withdraw his plea. Ex. 1 at 5. It appears from the petition that the same  
13 sentence was imposed on remand. Pet. at 1. According to the state court website, petitioner filed  
14 a notice of appeal in the California Court of Appeal on December 14, 2005. Ex. 2. Petitioner  
15 voluntarily abandoned the appeal, and it was dismissed on February 8, 2006. Ex. 2.

16 According to the state court website, petitioner filed a petition for writ of habeas corpus  
17 in the California Supreme Court on November 30, 2005, which was denied on August 30, 2006. Ex.  
18 3.

19 Petitioner filed the present petition for writ of habeas corpus in the Eastern District of  
20 California on November 26, 2007. Ex. 4. The petition was ordered transferred to the Northern  
21 District of California on December 7, 2007, where it was filed on December 12, 2007. Ex. 4 and  
22 Docket No. 1.

**ARGUMENT****THE FEDERAL HABEAS PETITION IS UNTIMELY**

The AEDPA imposes a one-year statute of limitations on the filing of federal habeas petitions. 28 U.S.C. § 2244(d). The year commences on “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A).

Petitioner’s conviction became final on February 8, 2006, when he voluntarily dismissed his direct appeal. *White v. Klitzkie*, 281 F.3d 920, 923 (9th Cir. 2002); Cal. Rules of Court 8.316.

The AEDPA allows for tolling during the pendency of a “properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim.” 28 U.S.C. § 2244(d)(2).

As outlined above, petitioner filed a petition for writ of habeas corpus in the California Supreme Court on November 30, 2005, prior to the commencement of the limitations period. The petition was pending until the California Supreme Court denied it on August 30, 2006. Petitioner therefore had until August 30, 2007 to file his federal habeas petition. *See Patterson v. Stewart*, 251 F.3d 1243 (9th Cir. 2001). Petitioner did not file his federal petition until November 26, 2007, almost three months after the limitations period expired. Accordingly, dismissal is warranted.

**CONCLUSION**

Since the instant petition was not filed within one year of the date of final judgment, we respectfully request that the Court dismiss the petition for writ of habeas corpus with prejudice.

Dated: May 12, 2008

Respectfully submitted,

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GERALD A. ENGLER  
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PEGGY S. RUFFRA  
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/s/ Jill M. Thayer  
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Attorneys for Respondent

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## **EXHIBIT 1**

**COPY**

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

**FILED**

OCT 20 2004

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK ANTHONY SANCHEZ,

Defendant and Appellant.

H026365

(Santa Clara County  
Super. Ct. No. CC111849)

Court of Appeal - Sixth App. Dist.

By DEPUTY

OCT 21 2004

By E. T. LINDEN  
No. SF2003DA1078

Pursuant to a plea agreement, defendant Frank Anthony Sanchez pleaded no contest to 10 felonies and one misdemeanor, and admitted a prior strike conviction in exchange for an agreed upon state prison term of between 11 years and 16 years 4 months.

In the middle of his sentencing hearing, defendant expressed his desire to withdraw his plea. The trial court failed to address defendant's request, and continued to sentence defendant. Judgment was entered.

On appeal, defendant asserts he was entitled to be heard on his request to withdraw his plea. We find the trial court erred in failing to consider defendant's request, and we remand the matter for the limited purpose of allowing defendant to file his motion to withdraw his plea.

F

STATEMENT OF THE FACTS AND CASE<sup>1</sup>

By information filed in August 2002, defendant was charged with assault on a peace officer with a deadly weapon (Pen. Code, § 245, subd. (c)),<sup>2</sup> driving under the influence of alcohol and drugs causing injury (Veh. Code, § 23153, subd. (a)), reckless driving while evading a peace officer (Veh. Code, § 2800.2, subd. (a)), driving under the influence of alcohol and drugs causing injury, with five multiple victim enhancements (Veh. Code, §§ 23153, subs. (a), 23558), hit and run accident resulting in injuries (Veh. Code, § 20001, subs. (a)/(b)(1)), exhibiting a weapon at a peace officer (§ 417.8), exhibiting a firearm in the presence of a peace officer (§ 417, subd. (c)), possession of a firearm by a convicted felon (§12021, subd. (a)(1)), possession of ammunition by a prohibited person (§ 12316, subd. (b)), altering the identification on a firearm (§ 12090), and using or being under the influence of a controlled substance, a misdemeanor (Health & Saf., § 11550, subd. (a)). The information also alleged defendant had a prior conviction of attempted murder, which was both a strike and a serious felony conviction. (§§ 667, subs. (b)-(i), 1170.12, 667, subd. (a)).

Pursuant to a plea agreement, defendant pleaded no contest to all counts and admitted the enhancements in the information, for an agreed upon sentence of between 11 years and 16 years four months in state prison. The People agreed to dismiss the allegations of injuries as to three persons in the driving under the influence causing injury charge. Defendant filed a motion pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, requesting that the court dismiss his prior strike conviction in the interest of justice. The court denied the motion, and sentenced defendant to the probation department's recommendation of 16 years 4 months in state prison.

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<sup>1</sup> We state only the facts that are relevant to defendant's limited issue on appeal regarding whether the trial court erred in failing to consider defendant's request to withdraw his plea.

<sup>2</sup> All further statutory references are to the Penal Code unless otherwise stated.

At defendant's sentencing, the court indicated defendant would receive 361 days of actual credit, and 180 days of conduct credit for a total of 541 days of credit for time served in custody. During defendant's sentencing hearing, the probation department represented to the court that defendant was not entitled to a year of credit for time he served in custody, because defendant's parole violation involved mixed conduct, making defendant ineligible for dual credits. Upon hearing that he would not receive credit for all the time he had spent in custody, defendant told the court he wished to withdraw his plea. The court did not address defendant's request, and continued to complete the sentencing. Judgment was entered, and defendant filed a timely notice of appeal.

#### DISCUSSION

Defendant asserts on appeal that the trial court erred in failing to consider his request to withdraw his plea. Section 1018 allows a defendant to move to withdraw his plea of guilty or no contest on a showing of good cause any time before entry of judgment. In addition, section 1018 states: "[t]his section shall be liberally construed to effect these objects and to promote justice."

Here, the record demonstrates that the court never considered defendant's request to withdraw his plea. In the middle of pronouncing sentence, the court asked the probation officer to state the amount of custody credits to which defendant was entitled. The probation officer represented that defendant was not entitled to a year of credit, because the parole violation involved mixed conduct, making defendant ineligible for dual credits. When he learned he would not receive all the credits to which he believed he was entitled, defendant stated: "I wish to withdraw my plea if that's the case . . . ." The court conducted a brief conversation with defendant regarding the custody credits, and when defendant repeated his request, stating: "I wish to withdraw my plea and go to trial . . .," the court simply responded: "I understand what you are saying." The court then continued to advise defendant of his parole period, and concluded the hearing. The court's colloquy with defendant did not amount to consideration of defendant's request to



withdraw his plea. At the very least, the court should have given defendant the opportunity to discuss the matter with his counsel, and set a briefing and hearing schedule for the motion.

Here, the court's failure to consider defendant's request to withdraw his plea violated defendant's fundamental rights to a jury trial, and to testify on his own behalf. A defendant's request to withdraw his plea vests entirely in him, and does not need the concurrence of his counsel as being in his best interest. (See *People v. Osorio* (1987) 194 Cal.App.3d 183 (*Osorio*); *People v. Brown* (1986) 179 Cal.App.3d 207.) Moreover, "the right to seek to withdraw a guilty plea implicated the defendant's fundamental rights to a jury trial and to testify in his own behalf." (*Osorio, supra*, 194 Cal.App.3d at p. 188.) In this case, the court failed to consider defendant's request, continuing to sentence defendant and ultimately, entering judgment. This violated defendant's constitutional rights.

The People assert defendant's request was untimely, because it occurred during the sentencing hearing, which, in the People's view, constituted rendering of judgment. However, what the People fail to recognize is the fact that in this case, defendant expressed his desire to withdraw his plea *before* the court completed sentencing. Therefore, judgment was not yet pronounced, and the request was timely under section 1018.

In addition, the People's argument that the court considered defendant's request and impliedly denied it is equally unpersuasive. There is nothing in the record before us to demonstrate that the trial court considered defendant's request. When defendant stated that he wished to withdraw his plea, the court did not inquire into defendant's understanding of the plea agreement, or whether defendant's plea was as a result of "[m]istake, ignorance, or any other factor overcoming the exercise of free judgment . . . ." (*Brown, supra*, 179 Cal.App.3d at pp. 213-214.) Moreover, the court did not conduct any

hearing, and did not rule on the request. As such, we find the court did not consider defendant's request, and did not impliedly deny it.

In sum, the trial court erred in failing to consider defendant's request to withdraw his plea. The matter must be remanded to the trial court to give defendant the opportunity to pursue his motion to withdraw his plea.

#### DISPOSITION

The judgment is reversed. The matter is remanded to the trial court for the limited purpose of allowing defendant to file his motion to withdraw his plea pursuant to section 1018.<sup>3</sup> If defendant does not file a motion, or files a motion that is denied, the trial court shall reinstate the judgment.

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<sup>3</sup> Because we remand the matter for defendant to pursue his motion to withdraw his plea, we need not consider whether defendant's additional contention that he has good cause to withdraw his plea. Additionally, in light of the disposition of this appeal, the issue defendant presents in his supplemental brief regarding the propriety of consecutive sentencing under *Blakely v. Washington* (2004) 542 U.S. \_\_\_\_ [124 S.Ct. 2531], is moot.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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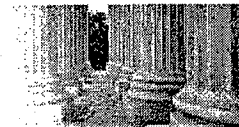
ELIA, J.

*People v. Sanchez*  
H026365

## **EXHIBIT 2**

# CALIFORNIA APPELLATE COURTS

Case Information



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**6th Appellate District**

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Opinions

## Docket (Register of Actions)

The People v. Sanchez  
Case Number H029649



Date	Description	Notes
12/14/2005	Notice of appeal lodged/received (criminal).	
12/14/2005	Counsel appointment order filed.	
12/19/2005	Court reporter extension granted.	Reporter: Gorley, Heather (009195). Deadline extended to: 01/27/06. per signed acknowledgment
12/30/2005	Recommendation of counsel by SDAP filed.	Charles B. Holzhauer obo applnt Sanchez
01/03/2006	Record on appeal filed.	C-1; R-2
01/31/2006	Granted - extension of time.	(1) Attorney: Holzhauer, Charles Party: Sanchez, Frank
02/08/2006	Filed document entitled:	abandonment of appeal
02/08/2006	Remittitur issued.	
02/08/2006	Dismissal order filed.	Pursuant to the request of the appellant, the appeal filed on December 8, 2005, is dismissed. The remittitur shall issue forthwith.
02/08/2006	Case complete.	
03/16/2006	Record purged - to be shipped to state records center.	

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## **EXHIBIT 3**

# CALIFORNIA APPELLATE COURTS

Case Information



Supreme  
Court

**Supreme Court**

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## Docket (Register of Actions)

Calendar

**SANCHEZ (FRANK) ON H.C.**

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**Case Number S139211**

Opinions

Date	Description	Notes
11/30/2005	Petition for writ of habeas corpus filed	Frank Sanchez, petitioner in pro per.
08/30/2006	Petition for writ of habeas corpus denied	



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## **EXHIBIT 4**



CLOSED, HABEAS

**U.S. District Court**  
**Eastern District of California - Live System (Sacramento)**  
**CIVIL DOCKET FOR CASE #: 2:07-cv-02524-GEB-DAD**  
**Internal Use Only**

(HC) Sanchez v. Director of Corrections, et al  
Assigned to: Judge Garland E. Burrell, Jr  
Referred to: Magistrate Judge Dale A. Drozd  
Cause: 28:2254 Petition for Writ of Habeas Corpus  
(State)

Date Filed: 11/26/2007  
Date Terminated: 12/07/2007  
Jury Demand: None  
Nature of Suit: 530 Habeas  
Corpus (General)  
Jurisdiction: Federal Question

**Petitioner****Frank A. Sanchez**represented by **Frank A. Sanchez**

K-47653

CA Substance Abuse Treatment  
Facility

CSATF

P. O. Box 7100

Corcoran, CA 93212

PRO SE

V.

**Respondent****Director of Corrections****S.A.T.F.****Respondent****Jerry Brown***Attorney of the State of CA*

I hereby certify that the annexed  
instrument is a true and correct copy of  
the original on file in my office.

ATTEST: **VICTORIA C. MINOR**Clerk, U. S. District Court  
Eastern District of California

By

*a. Kas*

Deputy Clerk

Dated

*12/7/07*

Date Filed	#	Docket Text
11/26/2007	<a href="#"><u>1</u></a>	PETITION for WRIT of HABEAS CORPUS by Frank A. Sanchez. (Marciel, M) (Entered: 11/27/2007)
11/26/2007	<a href="#"><u>2</u></a>	APPLICATION to Proceed IFP by petitioner Frank A. Sanchez. (Marciel, M) (Entered: 11/27/2007)

11/27/2007	●3	PRISONER NEW CASE DOCUMENTS ISSUED (Attachments: # <u>1</u> Consent Forms) (Marciel, M) (Entered: 11/27/2007)
11/27/2007	●	SERVICE BY MAIL: <u>3</u> Prisoner New Case Documents for GEB served on petitioner Frank A. Sanchez. (Marciel, M) (Entered: 11/27/2007)
12/07/2007	●4	ORDER signed by Judge Dale A. Drozd on 12/6/07 ORDERING that this court has not ruled on petitioner's ifp appl; and CASE is TRANSFERRED to the Northern District of CA. Transmittal letter, certified copy of transfer order, and docket sheet sent. CASE CLOSED (Kastilahn, A) (Entered: 12/07/2007)
12/07/2007	●	SERVICE BY MAIL: <u>4</u> Order Transferring Case Out to Another District, served on Frank A. Sanchez. (Kastilahn, A) (Entered: 12/07/2007)
12/07/2007	●5	TRANSMITTAL of DOCUMENTS on *12/7/2007* to *USDC Northern District of CA* *P.O. Box 36060* *San Francisco, CA 94102*. ** *Electronic Documents: 1 to 4. *. (Kastilahn, A) (Entered: 12/07/2007)